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No. 95-1129

In the Supreme Court of the United States

OCTOBER TERM, 1995

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether income received by individual members of the Red Lake Band of Chippewa Indians from logging activity conducted on tribal land is exempt from federal income tax.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a-23a) and the opinion of the district court (Pet. App. 6a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1995. The petition for rehearing was denied on October 12, 1995 (Pet. App. 25a). The petition for a writ of certiorari was filed on January 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gerald F. Brun and Luella R. Brun are members of the Red Lake Band of Chippewa Indians (the Band), a federally recognized Indian tribe. During 1983, 1984, and 1985, petitioners derived income from the sale of timber that they cut from land located on the Red Lake Reservation that is held in trust for the Band by the United States Government. None of this land had been allotted to petitioners under a trust patent pursuant to the General Allotment Act of 1887 (Pet. App. 21a).

2. The Commissioner of Internal Revenue determined that the income that petitioners derived from timber sales was subject to federal income tax. Petitioners paid the resulting assessments of tax and interest and brought this suit for refund.[1] They alleged that the assessments violated tribal treaty rights, Article VI of the United States Constitution, and congressional policies regarding tribal timber and the exercise of treaty-protected activities. Petitioners relied specifically on Article V of the

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[1] Petitioners initially filed this refund suit in the United States District Court for the District of Columbia. They were joined as plaintiffs in the suit by the Band, acting both on its own behalf and as *parens patriae* for its members. The Band sought declaratory and injunctive relief, as well as relief in the nature of mandamus, precluding the imposition of federal taxes on income derived from logging activity on tribal land. The district court dismissed the complaint for improper venue as to petitioners' refund claim and for lack of jurisdiction as to the claims of the Band. Petitioners' refund claim was subsequently transferred to the United States District Court for the District of Minnesota. The claims of the Band were not reinstated or transferred, and the dismissal of those claims was not appealed (Pet. App. 7a, 21a-22a).

Treaty of Greeneville, Aug. 3, 1795, 7 Stat. 52, which provides in pertinent part as follows (Pet App. 40a):

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States[.] * * * [Until the tribes' lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States * * * .

3. The district court held that the income that petitioners derived from logging activities is not exempt from federal income tax (Pet. App. 14a). The court noted that members of Indian tribes are subject to federal tax in the absence of a specific exemption by treaty or statute and that the rule of construction favoring Indian signatories to a treaty applies only when the treaty in question contains language that could reasonably be construed to confer an exemption (Pet. App. 10a-12a). Following the opinion of the Eighth Circuit in *Jourdain* v. *Commissioner*, 617 F.2d 507, 509, cert. denied, 449 U.S. 839 (1980), the district court found that the "molestation" that is prohibited by the Treaty of Greeneville does not refer to federal taxation but—as the language of the Treaty reflects—to interference with the rights of the Indians to hunt, plant, dwell upon, and otherwise enjoy the land (Pet. App. 13a). The court also noted that the express tax exemption provided under the General Allotment Act is inapplicable to income

derived from unallotted tribal land (Pet. App. 14a). The court therefore granted summary judgment to the government (Pet. App. 15a, 17a-18a).

4. The court of appeals affirmed per curiam (Pet. App. 20a-23a). The court noted that it previously had held that the Treaty of Greeneville, on which petitioners rely, protected "the rights of Indians to hunt and otherwise enjoy their land" and did not confer a "'right' to be free from federal taxation" (Pet. App. 23a, quoting *Jourdain* v. *Commissioner*, 617 F.2d at 509). The court therefore affirmed for the reasons set forth in detail in the opinion of the district court (Pet. App. 23a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Like all other citizens of the United States, members of Indian tribes are subject to federal income taxation unless exempt by treaty or statute. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2224 n.16 (1995); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156-157 (1973); *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 420 (1935). Moreover, as this Court has consistently held, with respect to "Indians as to all others," tax exemptions are not to be found by implication but must be clearly expressed. *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606 (1943). See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 156; *Squire* v. *Capoeman*, 351 U.S. at 6; *Choteau* v. *Burnet*, 283 U.S. 691, 696 (1931).

Petitioners have not identified any statute or treaty provision that exempts their logging income from federal income tax. The Treaty of Greeneville, on which they principally rely (Pet. 4-5; see also Pet. App. 8a-9a, 21a), is completely silent with respect to taxation.[2] Furthermore, the conclusion reached by the court of appeals both in the present case (Pet. App. 23a) and in *Jourdain* v. *Commissioner*, 617 F.2d at 509—that "the 'molestation' prohibited by the Treaty of Greeneville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation"—is well founded. A federal income tax was not contemplated by either the United States or the signatory tribes when the Treaty of Greeneville was executed in 1795, and the drafters thus could not have been referring to exemption from income taxation. Moreover, it is apparent from the language of the Treaty that the parties were instead concerned with physical harassment by white settlers and encroachment on Indian lands. For example, in Article V of the Treaty (Pet. App. 40a-41a), the United States bound itself to "protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." Article VII of the Treaty (Pet. App. 41a) provided that "[t]he said tribes * * * shall be at liberty to hunt within the

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[2] Although petitioners also refer (Pet. 4) to the Treaty of Old Crossing, Oct. 2, 1863, 13 Stat. 667, and the Supplement to the Treaty of Old Crossing, Apr. 12, 1864, 13 Stat. 689, as they did below (see Pet. App. 8a, 21a), these agreements, too, are silent on the issue of taxation (see Pet. App. 27a-30a, 32a-34a), and petitioners have not identified any other exemptive language within their terms.

territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States." In *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 342 & n.6 (1945), this Court similarly interpreted the term "molestation" in an Indian treaty to refer to physical interference with the quiet enjoyment and occupation of the land.

b. In the absence of a treaty provision specifically exempting petitioners' logging income from federal income tax, that income is taxable to them under Section 61(a) of the Internal Revenue Code. See 26 U.S.C. 1, 61(a); *HSCS-Laundry* v. *United States*, 450 U.S. 1, 5 (1981); *Squire* v. *Capoeman*, 351 U.S. at 6, 9-10 n.19; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. at 420-421; *Choteau* v. *Burnet*, 283 U.S. at 693-694. See also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2224 n.16. The fact that the same income would have been exempt from tax (see Pet. 17-18) if derived from a trust allotment (pursuant to the General Allotment Act of 1887 or legislation read in pari materia with that Act), if earned by the Band (see Rev. Rul. 67-284, 1967-2 C.B. 55, 58), or if received by petitioners as a per capita distribution of tribal revenues (under 25 U.S.C. 117 and 1407) demonstrates only that Congress may choose to accord exempt treatment to certain entities or types of income, while leaving other income, such as petitioners' logging income, subject to tax. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429, 431 (1955); *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949); *Deputy* v. *DuPont*, 308 U.S. 488, 493 (1940); *Choteau* v. *Burnet*, 283 U.S. at 696-697; *Fry* v. *United States*, 557 F.2d 646, 649 (9th Cir. 1977), cert.

denied, 434 U.S. 1011 (1978); *Commissioner* v. *Walker*, 326 F.2d 261, 263 (9th Cir. 1964); *Critzer* v. *United States*, 597 F.2d 708, 714 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979).[3]

2. a. Contrary to petitioners' argument (Pet. 8-15), the decision in this case does not conflict with established rules of treaty construction, including those articulated by this Court in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, *supra*. The principle that treaties are to be construed liberally in the favor of Indian signatories requires only that reasonable ambiguities be resolved in their favor. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2226 (Breyer, J., concurring in part and dissenting in part); *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Choate* v. *Trapp*, 224 U.S. 665,

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[3] Although petitioners contend that taxation of their logging income will reduce the value of tribal timber and thereby frustrate the objectives of self-determination and self-government by the Band (Pet. 17-18, 22-23), it is well settled that general policy objectives of that nature are insufficient to give rise to an implied tax exemption. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453-1454 (1994); *Dillon* v. *United States*, 792 F.2d 849, 857 (9th Cir. 1986), cert. denied, 480 U.S. 930 (1987); *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *Fry* v. *United States*, 557 F.2d at 649. Moreover, petitioners fail to recognize (Pet. 22-23) that concerns over tribal self-governance arise in a different context in a federal tax case than in a state tax case, for Congress retains plenary authority over Indian affairs. See *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2220, 2223; *Montana* v. *Blackfeet Tribe*, 471 U.S. at 765; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174-175 (1973).

675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Cf. *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). As this Court observed in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943), "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."

Petitioners go well beyond the text of the Treaty of Greeneville in arguing that the intent of Chippewa signatories should be the central element in determining whether the Treaty confers a tax exemption on them (Pet. 8-11, 15). An analysis of the specifics of the treaty language is notably absent both from petitioners' discussion of the treaty (Pet. 15-17) and from the declaration of their expert witness (Pet. App. 45a-79a). Neither petitioners nor their expert witness has offered any affirmative indication that the Indian signatories specifically intended or even desired to bar taxes or other exactions upon income from timber or any other source. They have thus furnished no adequate basis for interpreting a treaty prohibition against "molestation" to mean protection from the ordinary incidents of income taxation that apply to all other citizens.

b. This Court's opinion in *Oklahoma Tax Comm'n* v. *Chickasaw Nation* does not represent a departure from the principle that an income tax exemption for Indians may not be implied but must rest on language reasonably understood to confer the exemption. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 156; *Choteau* v. *Burnet*, 283 U.S. at 696-697; *Squire* v. *Capoeman*, 351 U.S. at 6; *Lazore* v. *Commissioner*, 11

F.3d 1180, 1185 (3d Cir. 1993); *Holt* v. *Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); *Hoptowit* v. *Commissioner*, 709 F.2d 564, 565 (9th Cir. 1983). The Court emphasized in that case that even "liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty." 115 S. Ct. at 2224. Far from undertaking an extended and speculative analysis of the Indian signatories' intent, as petitioners urge should be pursued (Pet. 10-11), the Court succinctly observed that "the purpose of the Treaty was to put distance between the Tribe and the States" and concluded that the signatories "likely gave no thought to a State's authority to tax the income of tribal members living in the State's domain, because they did not expect any members to be there." 115 S. Ct. at 2224.

That is precisely the approach followed by the court of appeals in the present case and in its prior decision in *Jourdain* v. *Commissioner*, 617 F.2d at 509. In construing a treaty provision whose terms are silent on the question of income taxation and whose purpose was, of course, unrelated to income taxation (see *ibid.*), the court of appeals correctly declined to infer the presence of an implied tax exemption that would require an interpretation of the word "molestation" to mean "taxation."

3. Petitioners contend (Pet. 18-22) that the decision below failed to satisfy the ordinary standards for summary judgment. But, once the government established that no treaty or statute contains exemptive language that may reasonably be construed to confer a pertinent tax exemption, it was appropriate for summary judgment to be granted to the government. The disagreement that petitioners have with

the award of summary judgment—and their desire to offer speculative evidence concerning intent, notwithstanding the limited text of the Treaty—relates to the merits of the decisions below, not to the procedures that were followed in reaching those decisions. With respect to the merits of decisions below, and their interpretation of the provisions of the Treaty, there is no conflict among the courts of appeals or other reason to warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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